

Tax & regulatory services

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(1) External commercial borrowing policy

Cross Border Borrowings in Foreign Exchange by Indian entities

The External Commercial Borrowing (ECB) policy is regularly reviewed by the Government of India in consultation with the Reserve Bank of India (RBI) to keep it aligned with the evolving macroeconomic situation, changing market conditions, sectoral requirements and the external sector. Pursuant to such review, the ECB policy has been partially modified.

Amendments to the ECB Policy

While the overall ECB policy remains unchanged, the key amendments are summarised below.

(i) The all-in-cost ceilings in respect of ECBs are modified as follows:

Average Maturity Period	All-in-Cost ceilings over 6 Months LIBOR	
	Existing	Proposed
3 years and up to 5 years	150 bps	200 bps
More than 5 years	250 bps	350 bps

All-in-cost includes rate of interest, other fees and expenses in foreign currency except commitment fee, pre-payment fee, and fees payable in Indian Rupees. The payment of withholding tax in Indian Rupees is excluded for calculating the all-in-cost.

(ii) Presently, borrowers proposing to avail ECBs up to US\$20 million for Rupee expenditure for permissible end-uses require prior approval of the RBI under the Approval Route. Going forward:

- Borrowers in the infrastructure sector have now been permitted to avail ECB up to US\$100 million for Rupee expenditure for permissible end-uses under the Approval Route;
- In case of other borrowers, the existing limit of US\$20 million for Rupee expenditure for permissible end-uses has been enhanced to US\$50 million under the Approval Route.

The above amendments to the ECB policy will become effective from the date of issue of the Notification of Regulations/directions issued by the RBI in this regard under the Foreign Exchange Management Act, 1999.

Source: Press Release BSC/SS/GN-132/08 dated 29 May 2008 (web site of the Press Information Bureau).

(2) Setting up of an office in India proposed to be streamlined

With a view to streamlining the setting up of a Branch Office and Liaison Office in India by foreign entities, the Reserve Bank of India (RBI) proposes to change the regime with effect from 1 July 2008. We outline a gist of the main changes.

Criteria

For the first time, the criteria for considering the applications for setting up a Branch Office or Liaison Office are being made public. Applications will be considered at two levels – according to basic criteria and additional criteria.

Basic Criteria

At the basic level, it will be considered whether the sector in which the applicant operates is eligible for 100% foreign direct investment (FDI) on the 'Automatic Approval' route.

- **RBI Route** – if the sector is eligible for 100% FDI under the automatic route, the RBI grants permission to set up the office on its own without having to refer the proposal to the government.
- **Government Route** – if in the relevant sector less than 100% FDI is allowed under the automatic route, the RBI will consider the application in consultation with the Department of Economic Affairs within the Government of India (Ministry of Finance) and the respective administrative ministry.

Additional Criteria

In addition to the above, the foreign applicant will have to satisfy the following two conditions.

- **Track record** – for setting up a Branch Office in India, the foreign entity must have a successful, profit-making track record during the immediately preceding five years in the home country. For setting up a Liaison Office, the foreign applicant must have such a track-record in the immediately preceding three years.

- **Networth** – for setting up a Branch Office, foreign entity must have a minimum net worth of US\$100,000/-, whilst in the case of a Liaison Office the minimum net worth has to be US\$50,000/-. Net Worth is the total of paid-up capital and free reserves, less intangible assets as per the latest audited Balance Sheet or Account Statement certified by a CPA.

Changes in procedure

- **Submission of Application** – the application for setting up a Branch Office or Liaison Office will have to be made through an authorised dealer to the RBI (instead of directly to the RBI).
- **Unique Control Number** – RBI will allot a Unique Identification Number (UIN) to the new Offices, as also the existing Offices. This UIN will have to be quoted in all correspondence with the RBI and the Authorised Dealer.
- **Annual Submission** – An Annual Activity Certificate will have to be submitted to the Authorised Dealer (instead of filing various documents with the RBI). The said Certificate will have to be provided within one month of the date of finalisation of accounts.
- **Extension** – Authorised Dealers will be permitted to extend the validity period of an approval for a Liaison Office for another three years, provided certain conditions are fulfilled by it. No extension will, however, be granted for Liaison Offices of Non-Banking Financial Companies and construction companies, which will have to be closed down or be converted into a Joint Venture or Wholly Owned Subsidiary, in accordance with the FDI policy.
- **Closure Requirements** – at the time of closing the Liaison Office or Branch Office, an undertaking, along with a certificate from a Chartered Accountant, may be submitted (instead of an Income Tax Clearance Certificate obtained from Income Tax Authorities, which generally takes longer to obtain).

(3) Authority for Advanced Ruling (AAR) on taxability of income arising from sale of brand, trademark and brewing intellectual property by Foster's Australia Limited to SAB Miller in India

Background

- Foster's Australia Limited (the applicant) is a 100% subsidiary of Foster's group Australia.
- The business of the applicant includes the brewing, processing, packaging, marketing, promoting and selling of beer products in Australia and abroad. It owns various brands including Foster's brand in relation to beer products.
- The applicant holds certificates of registration of trademarks pertaining to Foster's Brand and it has been continuously using the Foster's Brand since its registration. In India, the applicant registered the Foster's trademark and "F" logo in July 1993.
- It had entered into a Brand License (BL) agreement in October 1997 with Foster's India granting brewing license to Foster's India. In addition, it also granted Foster's India an exclusive right to use the trademarks in the territory of India in relation to 'Carlton & United Breweries (CUB) Beer'.
- It had been paying taxes under the Indian Income tax law for royalty amounts received from Foster's India.
- Dismin Investment Pty Ltd. (Dismin), a Foster's group company held 100% shares of FBG India Holdings Ltd, a Mauritius Company which, in turn, directly and indirectly held shares of Foster's India Ltd. Dismin, vide the sale and purchase (S&P) agreement dated 4 August 2006, agreed to sell the shares of the Mauritius subsidiary to SAB Miller Ltd, UK (SAB Miller). By the same agreement, the applicant agreed to sell the trademark and Brand Intellectual Property (IP) and to licence the Brewing IP to SAB Miller. The consolidated consideration payable for the above was US\$120 million.
- Pursuant to the S&P agreement (and Deed of Assignment discussed below), the BL agreement between the applicant and Fosters' India was terminated in view of the clause in the BL agreement which provided for its termination, if any other person acquired or controlled more than 10% of the shares of Foster's India. Upon termination, the exclusive rights over trademarks, Brand IP and Brewing IP vested back with the applicant. (Please note that there were varying claims before the AAR about the date of termination of the BL agreement i.e. whether upon signing of the S&P agreement or after signing of the deed of assignment).
- In terms of the S&P Agreement, SAB Miller had the right to appoint its nominee who was entitled to receive the rights under the S&P Agreement and discharge all obligations of SAB Miller. Accordingly, it nominated – SKOL Breweries (SKOL), a company incorporated in India and a member of SAB Miller group.
- The applicant entered into a deed of assignment with SKOL in September 2006. By this deed which was executed in Melbourne, Australia, it assigned and conveyed all its right, title and interest in the trademark, all IP rights relating to the Fosters' brand in India in favour of SKOL free from all encumbrances. The applicant also granted SKOL an exclusive, perpetual and irrevocable license relating to Foster's brewing IP for the purpose of brewing, packaging and marketing of Foster's beer within the territory of India with a right to sub-license such right to any licensees of Foster's brand. A nominal sum of US\$100 was stated to be the consideration for assignment and no further royalty or fee was be payable in respect of such license.

Questions for AAR

1. Whether the receipt arising to the applicant, from the transfer of its right, title and interest in and to the Trademark and Brand IP and grant of exclusive perpetual licence of Brewing IP was taxable in India.
2. If the abovementioned receipt was held to be taxable in India, than whether the applicant is justified in contending that tax should be computed based on the consideration as per the independent valuation obtained by it?

AAR Ruling

In respect of Trademark and Brand IP

The AAR held that the applicant's contention that the intangible assets transferred by it have no particular geographical location and also no situs apart from the domicile of the owner does not merit acceptance.

It also held that it was equally untenable that the place of execution of contract determines the situs.

On a reading of all the agreements, it was clear that the applicant meant to ensure that the Foster's brand beer marketed with its trademark and logo acquire high reputation in the market and built considerable goodwill. The trademark registered in India together with the other features of Fosters' brand had undoubtedly generated appreciable goodwill in the Indian market and such goodwill had been nurtured in India by reason of coordinated efforts of the the applicant and Foster's India.

Thus, the applicant business presence in India manifested itself with the tie-up it had with Foster's India which made use of the IP rights granted to it. Hence, it is reasonable to hold that the marketing intangibles comprising the Foster's trademark and brand which were in use for nearly a decade had their abode in India.

Based on the above the AAR held that the capital asset transferred by and through S&P agreement read with Deed of Assignment were "situated in India" in terms of section 9(1)(i) of the Act.

The AAR also held that there is no legal principle that the situs of intangible assets such as trademark and goodwill would always go with ownership and they have no situs other than the country of fiscal residence of the owner.

In respect of Brewing IP

The Authority held that the core of Brewing IP was the brewing manual which was the product of research and development efforts of the applicant. It contained formula and technical aspects relating to the brewing and packaging of Foster's lager Beer. The brewing manual, though in a sense a trade intangible, is also in the nature of goods. With the applicant severing its business ties with Foster's India, the situs of brewing IP in the form of brewing manual shifted to Australia.

The brewing manual was physically made available to the nominee of the purchaser – SKOL on the completion of S&P Agreement in Australia. Therefore, the Brewing IP could not be said to be situated in India and hence, income attributable to such IP could not be taxed in India.

With reference to second question, the AAR held that the 'Independent valuation report' can certainly be relied upon by the applicant. It was however for the concerned Income-tax Authority to examine whether it represents true and correct value and apply such relevant factors that have material bearing on quantification of the consideration related to the taxable items. The AAR also observed that no independent valuation report has been filed before it during the proceedings.

Other Issues

On attribution of Income

The AAR also considered the contention of the applicant regarding apportionment of profits to India between trademark & brand IP and brewing IP. The AAR left that question to be determined by the tax authorities. The AAR found no legal basis for apportionment on the ground that the situs of the property transferred was fictionally at another place. When once the income is deemed to accrue or arise in India on account of transfer of capital assets situated in India, the entire consideration received in respect of such transfer should be treated as gross income.

The AAR rejected the applicant's contention that only such part of the income should be taxed in India, which can be reasonably attributable to India.

Tax implication on sale of Mauritius Co.

The AAR did not comment on tax implications arising on sale of shares of FBG Holdings India. On the issue raised by the revenue that entire transaction should be visualised as an integrated transaction, AAR was reluctant to make any observations given the lack of material before it. The question whether any subterfuge or colourable device was adopted in routing the deal through a media of various companies was not commented upon as it involves going into nuances of transfer of shares which was not an issue before the AAR.

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Source: The content under parts (1) and (3) in this news alert was sourced from PwC India newsletters dated 20 and 29 May 2008.